

VALUERS REGISTRATION BOARD

IN THE MATTER OF an Inquiry under
Section 32(2) of the Valuers Act 1948

AND

IN THE MATTER OF charges under
Section 31(1)(c) of the Valuers Act 1948
against **Valuer S**

BOARD OF INQUIRY:

MEL Gamby (Inquiry Chairperson)
PA Curnow
KR Taylor

COUNSEL:

T Gilbert for the New Zealand Institute of
Valuers
K McLuskie for Valuer S

DATE OF HEARING:

2 March 2015

DATE OF ORAL DECISION:

2 March 2015

DATE OF WRITTEN DECISION:

10 April 2015

The Complaint

1. The complainant lodged a complaint on 2 May 2014 against Valuer S, alleging fraud and the taking of electronic files belonging to them while Valuer S was employed by them.
2. It was alleged that the fraudulent activity took place over the 2012 year. Valuer S was dismissed from the complainants on 1 November 2012.
3. Valuer S had been employed as a contractor by the complainants since April 2005, a period of seven and a half years. It was alleged that the fraud was initiated by Valuer S after they replaced the office computer with their own computer and began invoicing on their own letterhead valuation fees for work properly undertaken as a contractor for the complainants. The fees received were deposited directly into Valuer S' personal bank account.
4. A spreadsheet and invoices were enclosed with the complaint detailing some 40 deposits lodged into the account of Valuer S, totaling \$14,124.64 GST inclusive.

Background

5. Valuer S was a contractor employed by the complainants. The Board was not presented with a documented contractual arrangement between the parties which, as far as The Board is aware, had never been committed to writing. Initially Valuer S was paid 50% of each fee and the balance was paid to the account of the complainants to be increased in the first year to 60% in favour of Valuer S. It was not clear whether that was on an invoice or receipts basis, that is to say whether, in the early stages, Valuer S was paid their share based on the complainants' invoice sent out or on the receipt of the funds.
6. Valuer S commenced their work in Office A and then became the sole practitioner in Office B where they worked as a sole practitioner until their contract was terminated.

7. The Board was told that, over time, the arrangement was changed at the instigation of the complainants. One such change was that Valuer S was required to replace the work computer with their own computer when the work computer was at the end of its life.
8. Another was, that if a fee was not received by the complainants, not only did Valuer S not receive their 60% but, the Board was told at the hearing, they were required to pay to the complainants the 40% of the fee that was lost. At some point Valuer S was required to pay their own professional indemnity insurance. These changes gave rise to an unhappy relationship but one that Valuer S said they were obliged to accept as they did not have the resources to challenge the complainants. As most, if not all of the clients, were clients of the complainants, these revised financial arrangements would inevitably have placed a strain on Valuer S' finances.
9. As there was no written contractual arrangement, the Board was told that, as far as Valuer S was concerned, there was no restriction on them undertaking work on their own account for their own personal clients. That matter was not taken further but is an indication of the uncertainty of the business relationship between the complainants and Valuer S.
10. The complainants advised the investigator for the New Zealand Institute of Valuers (NZIV) that the fraud came to light when they became suspicious after a client queried two of Valuer S' valuations. The invoice numbers quoted by the client were not in the complainants' records and, as a result, they entered Office B at 3 am one morning when Valuer S was not present and discovered that other deposits had also been made directly into Valuer S' account, totaled to a sum of \$14,124.64 inclusive of GST.
11. The complainants went to the Police in March 2013 and laid a complaint about the alleged fraud, but the Police declined to take the matter further. This was confirmed to the investigator by the complainants.
12. Valuer S purchased a new computer with their own funds which became their personal property. All of the valuation information from the old computers was transferred onto the new computer. The complainants, it was said, were aware of this because they paid for the computer technicians to transfer the files. By this action and no proper control over the ownership of files, the arrangements became increasingly confused.

13. Other allegations were made by the complainants against Valuer S but were not proceeded with relating to the taking of electronic files which, after the relationship came to an end and, as Valuer S advised the Board, the data was removed from their computer by a computer technician employed by the complainants.
14. At the end of the day, the only matter before the Board was comprised in two charges, the first relating to unethical conduct and a breach of Clause 1.1 of the NZIV Code of Ethics. The second charge was made out in the alternative, of improper conduct under Section 31(1)(a) of the Valuers Act 1948. The second charge was not proceeded with.

The Charge

15. Section 31(1)(c) of the Valuers Act 1948

"That you have been guilty of such **unethical** conduct in the performance of your duties as a valuer as renders you liable to a penalty provided by the Valuers Act 1948 **in that** whilst undertaking valuation work when engaged by the complainants and which work was in their name and on its stationery, you received fees arising from that work into a personal bank account, without prior notification to and/or the consent of the complainants and thereby breached Clause 1.1 of the NZIV Code of Ethics".

16. Initially, Valuer S denied the charge. Prior to the hearing Valuer S, through counsel, advised that they would admit the charge, and duly did so at the hearing.
17. As the first charge was admitted and the second charge not having been proceeded with, the Board heard submissions on penalty and costs for the New Zealand Institute of Valuers (NZIV) and from counsel on behalf of Valuer S in mitigation.

Submissions for NZIV on Penalty

18. By pleading guilty, Valuer S accepts that their actions have breached Clause 1.1 of the New Zealand Institute of Valuers Code of Ethics which relevantly states:

"The first duty of each and every member is to render service to... member's employer with absolute fidelity, and to practise their

profession with devotion to high ideals of integrity, honour and courtesy...
and in a spirit of fairness and goodwill to fellow members...".

19. For the NZIV it was submitted that it was immaterial that Valuer S had an uncertain relationship with the complainants, whether as contractor or employee. The Board agrees. There can be no basis for breaching the Code of Ethics because of an uncertain contractual employment relationship.
20. Valuer S claimed they initiated a parallel invoicing scheme, presumably on the basis they were of the opinion that they could undertake work on their own account and also invoice separately to the complainants for its work. However, all of the valuations in evidence supporting the charge were prepared on the complainant's stationery and were therefore their valuations. There can be no doubt that all of the invoices should also have been prepared on the complainants' letterhead and fees recorded in their financial records.
21. Although Valuer S believed they were entitled to funds that were being clawed back by the complainants that was not an excuse for invoicing on their own letterhead. The submissions of NZIV are accepted that Valuer S should not have siphoned off fees into their own account.
22. The actions of Valuer S were improper, underhand and dishonest. The actions continued for approximately one year until discovered, resulting in a monetary loss to the complainants over this period breaching the high ideals of fidelity, integrity, honour, courtesy, fairness and goodwill Valuer S should have shown their fellow members as required by Clause 1.1 of the New Zealand Institute of Valuers Code of Ethics.
23. NZIV recognised that there were mitigating features being Valuer S' early guilty plea and their long history in the profession of 35 years during which period they had never before been involved in disciplinary proceedings.

24. The disciplinary powers of the Board are set out in ss 31 & 33 of the Act. In increasing seriousness these powers include:
- (a) a reprimand;
 - (b) a fine not exceeding \$10,000;
 - (c) suspension from the register for up to 12 months; and
 - (d) removal from the register
25. It was submitted for the NZIV that the matters in *Hart v Auckland Standards Committee 1*¹ are directly relevant to Valuer S' case including the following important factors, quoted from the decision in *Hart*, when considering a strike-off.
- 26.
- "(a) The nature and gravity of the charges that have been proved. In some cases, this may be determinative because they may conclusively demonstrate the practitioner is unfit to continue practice as a lawyer.²
- Often dishonesty, at least in the lawyers' context, generates a strike-off.
- (b) Where lesser forms of misconduct are established, the manner in which the practitioner has responded to the charges may be a significant factor.³
- (c) (i) Public confidence in the legal profession depends significantly upon practitioners fully cooperating with the investigative phase of the disciplinary process. At a minimum this requires prompt compliance with lawful requests made by investigating bodies, and with timetables imposed.⁴
- (ii) Willingness to participate fully in the investigative process, and to acknowledge error or wrongdoing, may demonstrate insight by the practitioner. This coupled with an acceptance of responsibility for misconduct may indicate a lesser penalty than striking off is sufficient to protect the public.⁵
27. NZIV recognised that there were mitigating features being Valuer S' early guilty plea and their long history in the profession of 35 years during which period they had never before been involved in disciplinary proceedings.
28. Based on *Hart* it was submitted by NZIV that Valuer S' failings were very significant and serious. However, it was acknowledged that clients were not affected and thus reputational damage to the profession has been avoided.

¹ *Hart v Standards Committee 1* (2013] NZHC 83, (2013] 3 NZLR 103 at (181] and following

² *Ibid* at (186]

³ *Ibid* at (187]

⁴ *Ibid* at [224]

⁵ *Ibid* at (87]

29. Conversely, although initially Valuer S attempted to defend their actions, they responded appropriately with an early guilty plea and therefore implicitly admitted the charge.
30. Finally, Valuer S did not have any previous disciplinary history and that is to their credit.
31. NZIV submitted that Valuer S should be suspended for a period of 6-12 months, fined and reprimanded.

Submissions for Valuer S

32. Following an outline of the factual matters, it was submitted on behalf of Valuer S that they believed they were owed a sum of \$5,011.25 by the complainants and therefore the actual loss was \$5,893.05. Valuer S had repaid the sum of \$2,666.20 to the complainants. That sum excludes the monies paid to them while they were working for it. Valuer S continues to pay money to the complainants at the rate of \$50 per week. To the date of the hearing they had paid a sum of \$1,200.00.
33. Through their counsel, Valuer S expressed their genuine remorse and that they had taken the matter very seriously. They attended the hearing and presented an affidavit and records of their financial position. In their affidavit, Valuer S confirmed that they were working now in their own business. They are the sole income earner of their family. Valuer S confirmed that they had commenced paying \$50 per week to the debt collection agency employed by the complainants and that the claw-back debt had been repaid in full, but they disputed that the claw-back arrangement should have been imposed upon them.
34. Valuer S relied on *Hart* and distinguished that case from their actions, response and history. For Valuer S it was submitted that this is not a case for de-registration or suspension, taking into consideration their circumstances which are now discussed.

35. Valuer S is profoundly deaf. Valuation, they said, is an ideal employment for them as it enables them to undertake work and communicate with clients mainly by correspondence including email. Their partner, who is otherwise unable to work through ill health, is able to assist them by conversing with clients when required and to act as a receptionist for them.
36. It was submitted on behalf of Valuer S that a fine towards the higher end of the range available to the Board being \$5,000 or above would be an appropriate sanction rather than suspension.
37. For Valuer S suspension would have far reaching consequences, effectively the equivalent of de-registration. Valuer S, now working in a small township in a rural community, would be forced to obtain alternative employment in the event that suspension was imposed. It is speculative as to what that employment could be but, being profoundly deaf, their options would be limited. It is highly improbable they could obtain employment as a valuer under the direction of a registered valuer as opportunities in a small community are also limited. The margins within which valuation firms practice is such that they would be unlikely to earn a satisfactory income, if indeed any employment was available to them.
38. The public protection implications as the result of Valuer S' actions are nil. Valuer S now working independently is no longer in the same position with the same tensions that existed between them and the complainants.
39. It was submitted for Valuer S that the decision in the Supreme Court in *Z v Dental Complaints Assessment Committee*⁶ is relevant and in particular:
- “The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met the appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.”
40. The decision in *King v Valuer-General*⁷ confirms that the *Z* decision applies to disciplinary proceedings under the Act.

⁶ [2009] 1 NZLR 1

41. There has been no question in these proceedings before the Board as to the competence of Valuer S. The Board has also concluded that the protection of the public is not an issue in this case.
42. In summary, the Board accepts the submissions for Valuer S that a fine at the higher end of the range that can be imposed is appropriate, in conjunction with a reprimand.

Costs Incurred

43. Costs of \$12,754.35 were outlined in the submissions for the NZIV, amended in accordance with the submissions following the hearing made up of:

Legal fees	\$6,296.03
NZIV investigation	\$2,127.50
Board expenses	<u>\$3,427.65</u>
Total	<u>\$11,851.18</u>
Say	\$11,850.00
	including GST

44. The NZIV sought a contribution of 50% costs.
45. This was opposed for Valuer S with supporting precedent at a level as low as 35%.
46. The Board agrees with both counsel that the starting point is 50%. On rare occasions it has reduced this to 40% of the proper costs incurred. Costs have been confirmed at \$11,851.18, with supporting particulars provided at the request of the Board, considered proper costs for consideration.
47. The Board has reviewed the percentage that should be applied in this case against its other decisions which range between 40% and 60%, recognising

⁷ 17 December 2009, DC Wellington CIZ 2009-085-32

that, any sum not awarded against the registered valuer falls back to the profession.

48. There is justification for both increasing the costs because of the aggravating features of Valuer S' dishonesty and reducing the percentage as a result of their early plea, cooperation and attendance at the hearing. On balance, the Board considers that 50% of costs is appropriate and awards accordingly.

Decision of The Board

49. Following the hearing, the Board issued its oral decision which is confirmed in this written decision. For the record, the Board's oral decision is:

"Valuer S has pleaded guilty to a breach of Clause 1.1 of the New Zealand Institute of Valuers Code of Ethics. The Board has considered submissions on behalf of the NZIV and for Valuer S relating to penalty and costs. As to penalty the NZIV has sought suspension for a period of six months, a small fine and a 50% or more contribution to costs.

For reasons the Board heard today there is no likelihood of this type of offending reoccurring as Valuer S works now on their own behalf and is not considered a danger to the public as a result of this matter.

The offending that occurred was within the confines of the contractual relationship between Valuer S and their former employer.

The precise relationship of the complainants and Valuer S appeared never to have been reduced to writing. It is not in dispute that the terms under which Valuer S was remunerated changed over time putting a strain on the relationship.

Whilst that cannot be an excuse for Valuer S acting dishonestly, which they have accepted by pleading guilty, it may go some way to understanding the events that occurred after some six and a half years and continued one year before being discovered.

For Valuer S it was accepted that a substantial fine is appropriate at the higher level of the Board's discretion being above \$5,000, in addition to a reprimand and a proportion of costs.

The Board has determined that for reasons that will be expanded on in this written decision, suspension is not appropriate in this case."

Penalty

50. Valuer S is fined in the sum of \$10,000 being the maximum fine the Board can impose under the Act. Valuer S is also reprimanded for their dishonest behavior.

Costs Award

51. On the matter of costs, these are at the discretion of the Board, using 50% as the starting point.
52. In this case there are mitigating circumstances that, in the Board's opinion, would suggest costs be awarded at a level of 50%. This is in line with previous decisions which range between 40% at the lowest level, which is not appropriate in Valuer S' case, and 60% for more serious matters.
53. The Board awards costs of \$5,925.00 against Valuer S being 50% of the costs that the Board deems appropriate.



Evan Gamby
Inquiry Chairperson
10 April 2015